2001

State of Utah v. Neil Dixon : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH
Plaintiff-Respondent

vs.

NEIL DIXON
Defendant-Appellant

Case No. 13649

BRIEF OF APPELLANT

Appeal from a Judgment of the Third Judicial District, in and for Salt Lake County, State of Utah, The Honorable Joseph G. Jeppson, Presiding.

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of robbery, a felony of the second degree, in the Third District Court for the State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, Neil Dixon, was convicted by a jury of the crime of robbery on February 26, 1974, in

the Court of the Honorable Joseph G. Jeppson, and was sentenced to serve the indeterminate term provided by law in the Utah State Prison, namely one to fifteen years.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of guilt entered against him and a new trial in this matter.

STATEMENT OF FACTS

On December 8, 1973, about midnight, Jack D. Patterson, on duty as a clerk at a Seven-Eleven grocery store located at 4657 West and 5415 South in Kearns, was robbed. Mr. Patterson described the robber as black with a nylon stocking over his face to his nose, wearing a green field jacket and a blue stocking cap. In addition, he stated the robber had a "scraggly beard" and a .22 caliber pearl-handled revolver. The robber took something less than $20, then fled on foot. (T. 4-13)

Deputy David Kelly, Salt Lake County Sheriff's Office, testified that he was observing traffic at the intersection of 35th South and Redwood Road approximately 12:25 a.m. when he observed a passenger in a vehicle who was black. He followed the vehicle for some blocks, then stopped it when other police vehicles arrived on the scene. The defendant, who was the passenger, and another black man were ordered out

of the vehicle at gunpoint. The officers took a blue stocking cap and a .22 caliber revolver from the vehicle. The defendant was wearing a green jacket. (T. 49-55)

The defendant informed the police and testified at trial that he and the driver of the vehicle, his cousin Gary Scott, were searching for his sister-in-law's mother's house on the west side of town that evening, and that the pistol belonged to his grandmother and he intended to take it to her that evening. He denied emphatically having been involved in a robbery. (T. 99-114)

The appellant's grandmother, Mrs. Olivia Scott, testified the pistol in fact belonged to her, and she had loaned it to her grandson, the appellant's brother, some months earlier. (T. 142-144)

In addition, the driver of the vehicle, Gary Scott, could not be found by either the appellant (T. 113-114), or the State (T. 137-138), and the charges against Mr. Scott had been dismissed. (T. 67, 137)

When placed on the stand at the outset of the defendant's case, the victim, Jack D. Patterson, who had previously testified for the State, reiterated that he thought the robber was five feet four inches tall and distinctly smaller than himself. When asked to stand next to the appellant, he estimated the appellant's height at five feet ten inches, nearly equal to his. He admitted the floor where he was standing was level with the floor where the robber was standing at the grocery store. (T. 97-98) Sgt. Bruce Egan testified

that the description of the robber dispatched over his radio was five feet four inches in height. (T. 44) Deputy David Kelly had previously testified that the stocking cap found in the appellant's car was not unusual and that the officer owned several caps like it himself. (T. 65)

In addition, the green field jacket belonging to appellant, and introduced into evidence had a black collar and was not the standard army type field jacket. (T. 65) The victim, Mr. Patterson, did not recall seeing a black collar on the jacket of the robber. (T. 20)

Finally, the revolver which belonged to appellant's grandmother and which was taken from appellant's car had a broken plastic grip which Mr. Patterson testified he did not notice on the pistol used by the robber. (T. 22) The pistol was broken and could not have been fired when seized by the police. (T. 109).

ARGUMENT

POINT I

ITEMS OF PHYSICAL EVIDENCE SEIZED BY THE POLICE FROM THE VEHICLE IN WHICH THE APPELLANT WAS RIDING WERE THE FRUITS OF AN ILLEGAL AND UNCONSTITUTIONAL ARREST AND SEARCH, AND THEREFORE, SHOULD HAVE BEEN SUPPRESSED BY THE TRIAL COURT.

In the trial of this matter, three items of evidence: a blue stocking cap, (State's Exhibit No. 1), a .22 caliber revolver (State's Exhibit No. 2), and a green army-type field jacket (State's Exhibit No. 3), were introduced into evidence over the appellant's objection. (T. 145-6)

Appellant argues that these three items, the cap, gun, and coat were the fruits of an illegal arrest and search and seizure and therefore, were violative of Utah law and the rights of the defendant under both the Utah and the United States' Constitutions.

Appellant admits that the cap and coat belonged to him (T. 106, 107), and that he had control of the gun as he was returning it to his grandmother. (T. 108, 109) He, therefore, has the proper standing to object to their admissability against him at his trial. *Kaufman v. U.S.*, 394 U.S. 217, 22 L. Ed. 2d 227, 89 S. Ct. 1068 (1969).

The thrust of appellant's argument is that the police officer in question, Deputy David Kelly of the Salt Lake County Sheriff's Office, stopped the vehicle in which appellant was riding and examined it without probable cause to believe that the appellant, or the driver of the car, Gary Scott, had committed any violation of the laws of the State of Utah, traffic or penal.

Appellant contends that Deputy Kelly, who was sitting at an intersection, and who had heard that a black was involved in a robbery, merely stopped the first car he saw with a black man in it. In fact, Deputy Kelly admitted this at trial. (T. 59)

No description of a vehicle was ever broadcast for there were no witnesses who testified that a vehicle was involved. Deputy Kelly admitted he was not watching for a vehicle, but a person. (T. 60) Deputy Kelly further testified that he had the following information:

(a) a male black,
(b) approximately five foot nine, 140 pounds,
(c) wearing a dark green coat,
(d) with a scraggley beard,
(e) and a dark stocking cap,
(f) had robbed a Seven-Eleven Store in Kearns a few moments prior. (T. 51)

Sgt. Egan, Deputy Kelly's supervisor, differed with Deputy Kelly and had previously testified that the broadcast description of the robber was five foot four inches tall, (T. 35) which was the description given by the victim, Mr. Patterson, to the police. (T. 24) In addition, Sgt. Egan, in describing the broadcast, omitted the "scraggly beard" aspect of the description. (T. 35)

Deputy Kelly testified that while sitting at the intersection of Redwood Road and 35th South, he observed a vehicle with two blacks pull up to the red light there. He testified that he noticed the passenger was a male black with a scraggly beard and a green coat on, from twenty to twenty-five feet away. He admitted the suspect was not wearing a stocking cap. (T. 58) He also omitted any statement as to observation

of a traffic violation by the driver of the vehicle. In fact, he testified the passenger's features were the only reason he followed the vehicle. (T. 52)

Section 41-1-17, Utah Code Annotated, (1953) requires that police officers have ". . . reasonable belief that (a) vehicle is being operated in violation of any provision of this act (Motor Vehicle Act) or of any other law regulating the operation of vehicles . . ." before they may stop a vehicle and make inquiry of the driver. Such a law prevents a police officer from stopping any vehicle he desires upon whim, caprice or "hunch", and therefore unreasonably disturbing the personal privacy of the driver and occupants of such vehicle.

In the case at bar, Deputy Kelly admits by inference (T. 52), and by omission that the driver of the vehicle was not stopped because Deputy Kelly had "reasonable belief" that a provision of the Motor Vehicle Act was being violated. His justification for stopping the vehicle, therefore, becomes a question of whether or not he had probable cause to believe that the passenger in that vehicle, appellant Neil Dixon, had violated the law. If he did not have probable cause to stop the vehicle, the items taken from the vehicle are inadmissable on the grounds that they were the fruits of an illegal arrest and search, and or the fruits of an illegal stop of a motor vehicle under Section 41-1-17, Utah Code Annotated, (1953).

We, therefore, turn to the issue of probable cause for arrest and search without a warrant, and explore

the case law defining what constitutes probable cause for belief of violation of a crime on the part of a police officer.

The first authoritative pronouncement on probable cause concerned arrests and searches without a warrant. In *Wrightson v. U.S.*, 222 F. 2d 556 (1955), the U.S. Court of Appeals for the District of Columbia Circuit reversed a robbery conviction for the reason that the arrest in the case, made without a warrant, was made without "probable cause", and, therefore, all items seized as a result of such arrest should have been excluded by the trial court. The Court there held that:

> "An officer must show 'probable cause' to get a warrant from a magistrate, and he must have 'probable cause' to make an arrest without a warrant. . . We are here at the very heart of due process of law and, more directly, at the essence of the Fourth Amendment." 222 F. 2d at 558.

In the instant case, items were seized from the car in which appellant was riding after he was ordered from the car at gunpoint. (T. 62) Appellant contends that those items were the fruits of an unlawful arrest and search because the stopping of the car and the subsequent requirement that the appellant and Mr. Scott exit the vehicle at gunpoint constituted an arrest. The fact that the words "you're under arrest" were not pronounced prior to the officer's search of the vehicle is immaterial. In *Sibron v. New York,* 392 U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968), the United States Supreme Court held that a search incident to a lawful arrest may not precede the arrest and serve as

part of its justification. The legality of the search therefore depends upon the legality of the arrest. *Chimel v. California*, 395 U.S. 752, 23 L. Ed 2d 685, 89 S. Ct. 2034 (1969).

It therefore follows that in order for an arrest to be legal and constitutional, it must be made with a warrant or with the same probable cause required for a warrant. The reasoning of Justice Jackson, writing for the majority of the U. S. Supreme Cou t in *United States v. Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948) would seem to apply to the arrest and search in the instant case:

> "We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." 332 U.S. at 595.

The reasoning of Justice Jackson was buttressed by the *Wrightson* court, *supra*, when it said:

> "The requirement of 'probable cause' for action without a warrant is surely no less exacting than is the necessity for 'probable cause' for the issuance of a warrant. But, if officers can arrest without a warrant and never be required to disclose the facts upon which they based their belief of probable cause — if in other words, they have an untouchable power to arrest without a warrant — why should they ever bother to get a warrant?" 222 F. 2d at 559.

We now come to the question of whether or not the concept of "fitting the general description" con-

stitutes probable cause for a police officer to stop a vehicle, search it and arrest the occupants. It is clear that in the instant case Deputy Kelly relied totally on the fact that the appellant fit the general description of a robbery suspect to stop the vehicle, search it, and arrest the appellant. (T. 51)

In *Brown v. Teras*, 481 S.W. 2d 106 (1972), the Court of Criminal Appeals of Texas held that where a police officer had no specific knowledge connecting any of the defendants whom he observed in an automobile with an armed robbery he was aware of, and where the description of the robbers contained no identifiable characteristics which would distinguish them from the general population, the officer lacked probable cause to arrest the defendants without a warrant for robbery and items found in the warrantless search of the automobile were inadmissable. The description of the three holdup men consisted only of a designation as to race and an approximation as to height and weight.

The Court there said:

> "Probable cause for an arrest exists where, at that moment, the facts and circumstances within the knowledge of the arresting officer and of which he has reasonable trustworthy information, would warrant a reasonable and prudent man in believing that a particular person has committed, or is committing a crime. . . *The inarticulate hunch, suspicion or good faith of an arresting officer is insufficient to constitute probable cause. . .*" (emphasis supplied) 481 S.W. 2d at 110.

The Court went on to point out that the general description of the robbers that the officer had been given could have done no more than raise the officer's suspicion that the three men in the car were robbers. That suspicion alone, the Court said, did not constitute probable cause to stop the car, search it, and arrest the occupants. 481 S.W. 2d 112.

The police officer in the instant case, as in *Brown,* had no specific information linking appellant to the robbery. In fact, as was the case in *Brown,* Deputy Kelly had no reason to believe the robber of the Kearns store was in a vehicle and he was not looking for a specific vehicle. (T. 60) Lacking specific information linking the appellant to the Seven-Eleven robbery, the officer lacked probable cause to arrest him for that crime or to search the vehicle in which he was riding. *Whitely v. Warden ,Wyoming Penitentiary,* 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971). Further, in *Carrol v. United States,* 267 U.S. 432, 45 S. Ct. 280, 69 L. Ed. 543 (1923) and *Henry v. United States,* 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1969), the United States Supreme Court, while holding that the fact that suspects are in a car is a factor to be considered in determining whether exigent circumstances existed which precluded obtaining a warrant, also held that such a fact did not dispense with the need for probable cause." *Henry,* supra.

Finally, the most persuasive case to be considered by this Court should be *Gatlin v. U.S.,* 326 F. 2d 266 (1963) in which the United States Court of Appeals

for the District of Columbia reversed the robbery conviction of a black man because he was arrested without probable cause. This case should be particularly persuasive to this Court because its facts seem to square "on all fours" with the facts of the instant case. In *Gatlin*, the Court said:

> "Gatlin's arrest was without probable cause. It was an arrest for investigation. The only evidence on which arrest was predicated was the fact that there was a robbery, that one of the robbers was a Negro wearing a trench coat, that a Negro man fled from a taxi, and that Gatlin, a Negro man, was observed walking down the street a mile and a half from the robbery wearing a trench coat. *This is not the type of evidence which justifies deprivation of liberty.* (Emphasis added) 326 F. 2d at 670-1.

In the instant case, it will be recalled that the knowledge of Deputy Kelly at the time he spotted appellant was that a robbery had occurred; that the robber was a black man approximately five feet nine inches tall and weighing 140 pounds; that he was wearing a green coat and dark stocking cap; and (assuming arguendo, he was correct) the robber had a scraggly beard. (T. 51) Deputy Kelly observed the appellant, a black man with a scraggly beard wearing a green coat. The facts are essentially identical to the *Gatlin* case in which all evidence seized, i.e. a toy gun and $50 in cash, was held to be inadmissible because the police officer had no probable cause for arrest. The only significant factual difference in the two cases is that, in *Gatlin* the suspect was on foot, and in the in-

stant case, the suspect was a passenger in a vehicle. That fact itself would seem to strengthen appellant's argument in that the officer had no reason to believe the robber would be in a vehicle. (T. 60)

In conclusion, it would seem appropriate to sum up by once again quoting from Mr. Justice Jackson's majority opinion in *United States v. Di Re*, supra:

> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand." 332 U.S. at 595.

Appellant asks this Court to reverse his conviction and remand the case for a new trial, with an order suppressing all evidence obtained as a result of the unlawful arrest of defendant and search of the vehicle in which he was a passenger.

POINT II

THE ADMISSION OF A POLICE PHOTOGRAPH OF APPELLANT AT TRIAL WAS NON-PROBATIVE AND SO PREJUDICIAL AS TO DENY APPELLANT A FAIR TRIAL.

The State's attorney in this matter elicited testimony from Roger F. Taylor of the Salt Lake County Sheriff's Office concerning eight photographs shown to the witness, Mr. Patterson, three days after the robbery occurred. (T. 71-74) Appellant's attorney objected to testimony concerning these items and the objection was overruled by the Court. (T. 73-4)

Exhibit No. 8, a photograph of appellant, was procured by the officer the day following the robbery, and Officer Taylor testified further that Exhibit No. 8 was a police photograph taken the night appellant was arrested in this matter. (T. 72) The other photographs, Exhibit Nos. 5, 6, 7, 9, 10, 11, and 12 were not admitted into evidence due to appellants objection, but Exhibit No. 8, the photograph of appellant, was admitted over appellant's objection. (T. 95-6) This objection was later renewed as the basis for a motion for mistrial which the Court also denied. (T. 148-9) Appellant assigns the admission of Exhibit No. 8 into evidence and the subsequent denial of a mistrial on that basis as error in this appeal.

This Court, in observing Exhibit No. 8, will note that it is a particularly bad picture. The hair is unkempt, the dress of the appellant in unkempt. One might say the photograph gives the appellant the look of a criminal, when in court appellant appeared altogether different. Below appellant's photograph are numbers and the words "SALT LAKE COUNTY SHERIFF'S OFFICE." The photograph is actually two pictures, a side view and a front view. Such a

photograph of any innocent person may make that person look like a criminal.

The crux of appellant's objection revolves around the probative value of such a photograph. Perhaps if all eight photographs were admitted into evidence for the jury's consideration, they would be relevant to show that the witness picked appellant's picture from a number of pictures of people who looked like him. The State's attorney seemed to offer them into evidence for this purpose. Oddly enough, the Court excluded all photographs except that of the appellant. Had appellant's attorney attempted to introduce a picture of appelant as a choir boy in church, such an offer would undoubtedly have been denied as non-probative. What probative value then, is involved in a police photograph of the appellant which is such a bad likeness, he appears to resemble the average person's concept of a criminal?

Appellant believes that the admission of State's Exhibit No. 8 was so prejudicial as to have denied him a fair trial and asks that the judgment of the lower court be reversed and the matter remanded for a new trial.

POINT III

THE STATEMENT OF THE TRIAL JUDGE DURING APPELLANT'S CLOSING ARGUMENT GAVE THE IMPRESSION THAT THE TRIAL JUDGE DID NOT BE-

LIEVE APPELLANT'S TESTIMONY CONCERNING AN ALIBI WITNESS, AND THEREFORE PREJUDICED THE JURY AND DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL.

Enclosed in the Record of the case before the court is a handwritten statement by the Honorable Joseph G. Jeppson. (R. 33) In the statement Judge Jeppson states that:

> "Mr. Keller (defense attorney) in substance argues that the witness Scott could not be found anywhere. They had looked all over for him.
>
> Mr. Bullen (State's attorney) interrupted him and objected that the evidence did not show such a search.
>
> I sustained the objection and said the evidence did not show that anyone had looked very hard for him.
>
> I have written this within an hour after the verdict so I can recall it if asked later. I doubt that the reporter recorded it. She was not reporting the argument and says she can't take the part of the argument after it was given and while an objection is being made." (R. 33)

A reading of the transcript of trial shows that, in fact, the closing arguments, and therefore the Judge's statements, were not recorded.

Appellant argues that the Judge could have sustained the prosecutor's objection without comment, however, the comment, ". . . the evidence did not show

that anyone looked very hard for him. . .", was highly prejudicial to appellant since it tended to indicate, by its very nature, that the Judge did not believe the witness would provide an alibi for appellant. Although the State may argue that such a statement was not prejudicial since the Court instructed the jury that it did not intend to express an opinion on the evidence during the course of the trial, (R. 26), it will be noted that the Court instructed the jury prior to closing argument, and such a statement by a judge cannot help but influence a jury who looks to the judge during the entire trial for judgment and guidance as to its duty.

The witness in question, Gary Scott, was driving the vehicle in which appellant was riding when it was stopped on Redwood Road by Deputy Kelly. (T. 63) Appellant testified that he had been with Scott for several hours, including the time the robbery occurred. (T. 100-5) Mr. Scott is the only person who could have supported defendant's statements that he did not commit the robbery. However, the charges were dropped against Mr. Scott, (T. 67) and Mr. Dixon was subsequently unable to locate him despite his efforts to do so. (T. 113-4)

The defense even went so far as to call Herschel Bullen, the State's attorney, to the stand. Mr. Bullen testified that the State had attempted to subpoena Mr. Scott, but that the subpoena was returned unserved. (T. 137-8)

Counsel for appellant moved for mistrial on the basis of the Court's comment, but the motion was

denied. (T. 149) Appellant cites this fact as his third assignment of error in this case.

It goes without necessity for documentation that a fair trial is the most fundamental requirement of Due Process of Law; and "a fair trial means a trial before an impartial judge and an honest jury in an atmosphere of judicial calm." 21 AM. Jr. 2d § 235.

When a trial judge loses his impartiality, he jeopordizes a criminal defendant's right to a fair trial. *Gudger v. U.S.*, (App D.C.) 314 F. 2d 268 (1960). Recognizing this fact, the American Bar Association's Canons of Judicial Ethics, Canon 15, states in part:

> ". . . (The Judge) should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment."

The language of this Court has always upheld the proposition that a trial judge or prosecutor should refrain from doing or saying anything that might prejudice a defendant's right to a fair trial in a criminal case. In *State v. Jameson*, 103 Utah 129, 134 P. 2d 173 (1943), the Utah Supreme Court declared:

> "Both the court and the prosecutors should be zealous in protecting the rights of an accused, and should carefully refrain from doing or saying anything from which it might be inferred that an unfair advantage was taken of a defendant." 134 P. 2d at 175-176.

In *State v. Musser*, 110 Utah 534, 175 P. 2d 724 (1946), the Utah Supreme Court stated emphatically:

> "The Court's remark, if construed by the jury as indicated, would constitute a comment on the evidence. In this jurisdiction, such comment is not within the province of the Court." 175 P. 2d at 738.

In that case the Court discussed the probable prejudicial effect of a trial judge's comment during the trial, and although the Court did not reverse on that basis, it clearly indicated such comment was error.

> ". . . And if so understood by the jury, the remark could not be characterized as non-prejudicial. Characterizing as 'nefarious' a publication written by a defendant and used by other defendants in what they contended was propagation of religious views, could not but convey to the minds of the jurors the impression that the court thought that the writer of the book and the propagators of the views therein expressed are iniquitous." 175 P. 2d at 738.

The most persuasive and authoritative pronouncement of this Court, with respect to a trial judge's comments is found in *State v. Rosenbaum*, 22 Utah 2d 159, 449 P. 2d 999 (1969). In that case, this Court reversed the burglary conviction of a criminal defendant on the ground that the trial judge's comment to the jury regarding the weight to be given to defendant's alibi constituted prejudicial error. The comment was in the form of a cautionary instruction. The Court held:

> "We think that in this case it was prejudicial error for the court to indicate to the jury that they should apply a different standard for determining the weight of evidence regarding alibi from that which they were to apply to any other evidence in the case." 449 P. 2d at 1002.

Directly in point with the instant case, Justice Ellet began his majority opinion by declaring:

> "In this state the trial judge is not permitted to comment on evidence and *he, therefore, may not indicate to a jury that evidence is either weak or convincing. It is the sole and exclusive province of the jury to determine the facts in a criminal case, and this it must do regardless of the relative strength or weakness of the evidence in the case.* (emphasis added) 449 P. 2d at 1000.

It seems clear then, that in the State of Utah, where a trial judge is not allowed to comment on the evidence, any such comment constitutes error. And, as Justice Ellett observed in *Rosenbaum*, such comment indicating strength or weakness of evidence is prejudicial error.

In the instant case, the trial judge commented on the evidence when he stated that:

> ". . . the evidence did not show that anyone looked very hard for him (alibi witness) . . ." (R. 33)

In determining the possible prejudicial effect of such statement, this Court must consider that the comment was made immediately after the judge had sustained the State's attorney's objection to the defense attorney's

argument on the evidence during closing argument, and after the jury had been instructed by the court. Since it was the appellant who was to have relied on the witnesses testimony as part of his alibi defense, the logical inference and conclusion to be drawn by the jury was that the judge believed that the appellant didn't try very hard to find the witness and so was lying when he testified that the witness could provide him with an alibi. (T. 113)

Appellant asks this Court to consider the weight of authority presented in prior Utah Supreme Court decisions and grant him a new trial as it did for appellant *Rosenbaum*, supra.

CONCLUSION

On the basis of the three assignments of error heretofore presented, appellant urges this Court to reverse the judgment of the trial court and grant him a new trial in this matter.

Respectfully submitted,

LARRY R. KELLER